



DEC 17 2003

MEMORANDUM FOR:

Distribution

FROM:

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Acting NOAA NEPA Coordinator

SUBJECT:

Guidance on Adopting National Environmental Policy Act
Documents Prepared by Other Federal Agencies

Purpose

The purpose of this memorandum is to provide National Oceanic and Atmospheric Administration (NOAA) line and program offices with guidance on the procedure for adopting documents prepared by other Federal agencies to satisfy the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality (CEQ) implementing regulations (40 CFR Parts 1500-1508), and NOAA's implementing NEPA guidelines in NOAA Administrative Order (NAO) 216-6.

Background

NEPA requires all Federal agency decisionmakers to document the environmental effects of their actions in environmental impact statements (EISs) or environmental assessments (EAs) unless the proposed action is categorically excluded (CE) from this requirement in which case a brief memorandum documenting the use of a NOAA CE is prepared for the record. Actions undertaken by NOAA subject to NEPA include:

- Actions *taken directly* by NOAA (e.g., management plan development and approval, restoration actions, and facility construction and maintenance);
- Actions *funded* by NOAA (e.g., issuance of grants for fisheries research and coastal zone management); and
- Actions *authorized* by NOAA (e.g., permits issued under the Magnuson Stevens Act, Endangered Species Act, and National Marine Sanctuaries Act).

Occasionally, a NOAA program proposes to take an action that is closely linked to an action being proposed by another Federal agency. A typical example of this is when a Federal agency requires approval from a NOAA program to conduct an activity over which NOAA has regulatory or statutory authority. In these cases, NEPA compliance is required for *each* Federal agency proposing to take an action. As a result, there exists the potential for significant redundancy and duplication of effort in complying with NEPA. To address this, CEQ regulations allow agencies to jointly develop and prepare NEPA analyses and documentation.¹ When joint lead status is not used, it is possible to adopt documents prepared by other Federal agencies to satisfy NOAA's NEPA requirements under certain circumstances². In this way, an

¹ 40 C.F.R. § 1501.5

² See 40 CFR §1506.3. Additional guidance on adoption is included in CEQ's "Guidance Regarding NEPA Regulations" (48 FR 34263), which can be found on the internet at <http://ceq.eh.doe.gov/nepa/regs/1983/1983guid.htm>.



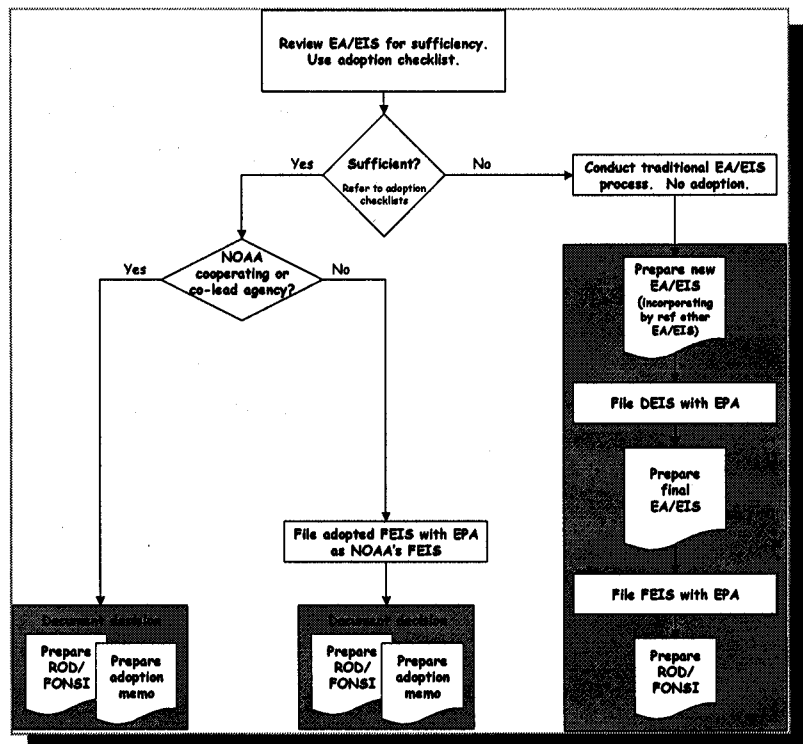
EIS prepared by another Federal agency could be used to satisfy the NOAA's NEPA requirements for the action or a related action (e.g., issuance of a permit).

The "adoption process" has the potential to significantly reduce the amount of time NOAA program staff would otherwise spend preparing new NEPA analyses and documentation. In some cases, it also allows for an abbreviated public review process (described below). However, this does not mean that no administrative action on the part of the responsible NOAA program is necessary. While more efficient than preparing a new NEPA analysis and document from scratch, there are still a few steps NOAA programs must take. These are explained in more detail below.

Adopting other agency NEPA analyses and documents

When a NOAA program decides it may benefit from adopting another Federal agency's NEPA analyses and document, it should follow these steps:

Step 1: Determine if the analyses and document are sufficient.³ Section 5.09f of NAO 216-6 and 40 CFR § 1506.3 only allow for the adoption of another Federal agency NEPA analyses and document if sufficient to meet NOAA's NEPA requirements as well as CEQ regulations and NEPA. In other words, the analyses and document prepared by the other Federal agency must meet NOAA requirements to be eligible for adoption. To assist in determining if a document and the analyses are sufficient, responsible program managers should refer to the attached checklists (Exhibits 1 and 2).



If deemed sufficient:

If the analyses and document prepared by another Federal agency are determined by NOAA to meet the requirements of NAO 216-6, CEQ regulations and NEPA, the responsible NOAA program may only need to recirculate the other agency's EA or EIS as described in Step 3 below.

³ Finding a document insufficient means that the NEPA analyses and or document is insufficient for NOAA's purposes. It does not mean that the other agency has lower standards than NOAA or that it is not in full compliance with NEPA. It could reflect differences between the agency's NEPA implementing procedures and NOA 216-6, or differences in the respective actions being proposed.

Step 2: Supplement if necessary.

If deemed insufficient:

If a document or analysis prepared by another agency is determined to be insufficient, NOAA cannot adopt it until the insufficiencies have been resolved⁴. Unless the other Federal agency revises its EA or EIS to address the insufficiencies identified by NOAA, the NOAA program must initiate the normal EA or EIS process⁵ incorporating by reference the EA or EIS (or relevant portions thereof) prepared by the other agency⁶. In such cases, there is no formal adoption.

If the action is not one taken directly by NOAA, but requires a type of approval (e.g., permit), it is appropriate for the lead agency to prepare the necessary NEPA documentation to meet NOAA's requirements. Ideally, agencies requiring NOAA approval should include NOAA as a joint lead or cooperating agency from the outset. Being a joint-lead or cooperating agency should ensure producing a sufficient document. In some cases, however, agencies may diverge in positions, resulting in a NEPA analysis and document that is insufficient for NOAA's decisionmaking. In other cases, NOAA may not be a joint-lead or cooperating agency (e.g., NOAA may not be aware of a proposal during development of the NEPA analyses and document). This may lead to a NEPA analysis and document that is insufficient for NOAA's needs. In such cases, NOAA should request that the action-proposing (lead) agency prepare a supplemental EA or EIS, or prepare new NEPA analyses and a document that address NOAA's needs. If this is not practicable, NOAA must use the normal EA or EIS process to prepare the requisite documentation and should consider incorporating by reference applicable and appropriate portions of the other agency's NEPA analyses and documents.

Step 3: Conduct the necessary public reviews.

This step is different depending on the type of analysis and document being adopted and assumes the adopted analysis and document has been deemed sufficient by the responsible NOAA program. EAs and EISs are treated separately.

For Environmental Impact Statements:

There are two possible scenarios to consider in this case.

1. NOAA was a joint-lead or cooperating agency. If NOAA was a joint-lead agency or a cooperating agency on an EIS and independently determined the EIS to be sufficient, the NOAA program proposing the action does not need to recirculate the EIS at all⁸. In these cases, the NOAA program can proceed directly to the next step.
2. NOAA was not a joint-lead or cooperating agency. If NOAA was not a joint-lead agency nor a cooperating agency but the action described in the EIS includes the proposed NOAA action or is "substantially the same" as NOAA's proposed action and is sufficient

⁴ The word "supplement" used in this memo is in the generic sense (i.e., adding something to the EA or EIS that is missing) and does not have the specific meaning as defined in CEQ regulations at 40 CFR § 1502.9(c) except where explicitly stated as such.

⁵ See NAO 216-6 § 5.04.

⁶ See 40 CFR § 1502.21

⁷ See 40 C.F.R. §§ 1500.4(j) and 1502.21

⁸ See 40 CFR 1506.3(c), which reads, "A cooperating agency may adopt without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied."

to meet NEPA, CEQ and NAO 216-6 requirements, the responsible NOAA program need only circulate the adopted FEIS as a final EIS⁹. This essentially allows NOAA to skip the DEIS step that applies in the normal EIS process.

For Environmental Assessments:

If the document being adopted by a NOAA program is an EA determined to be sufficient, there are no formal recirculation requirements. However, NAO 216-6 suggests that NOAA-prepared EAs be circulated as draft with a 30-day public review period if the program has adequate time to do so or where the EA would benefit from greater public participation¹⁰. When the action has broad national implications or when consulting agencies or the public have expressed significant reservations based on environmental concerns, NOAA-prepared EAs may be required to be released as a draft for at least 30 days prior to the final decision being implemented. This guidance extends to adopting EAs in accordance with NAO 216-6 § 5.03e.

Step 4: Document NOAA's decision in the record.

After the NOAA program proposing to take an action has reviewed the analyses and document for sufficiency and conducted the necessary recirculation requirements, it must make its own decision and document that decision in the administrative record. For EISs, this comes in the form of a record of decision (ROD). For EAs this is a decision on the environmental effects reflected in a finding of no significant impact (FONSI). The responsible NOAA program must prepare the FONSI or ROD independent of the other Federal agency. In fact, NOAA can have a ROD that implements a decision that is different from that of the other agency. NOAA cannot adopt decision documents of other Federal agencies¹¹.

Preparing an adoption document:

If an EA or EIS is to be adopted by a NOAA program, the responsible NOAA program should draft an "adoption document" to attach to the EIS or EA in the administrative record. A template adoption document is attached to this memo and can be used as a general guide (Exhibit 3). The purpose of the adoption document is to essentially link NOAA's action (and its effects) to the action described in the EA or EIS. Adoption documents should-

- Document how the EA or EIS satisfies NAO 216-6 guidance, CEQ regulations, and NEPA;
- Clearly define NOAA's proposed action and identify any differences between it and the proposed action of the Federal agency that prepared the EA or EIS; and
- Be signed by the appropriate Assistant Administrator.

Step 5: Implement the action as appropriate.

Once all above steps have been completed and the NOAA NEPA Coordinator has reviewed and cleared the necessary documents as described below, the program may proceed with the implementation of the proposed action.

⁹ See 40 CFR 1506.3(b)

¹⁰ See NAO 216-6 § 5.03e.

¹¹ See NAO 216-6 § 5.09f.3.

NEPA Coordinator review and clearance

The NOAA NEPA Coordinator's role in the adoption process is generally the same as it is with review and clearance of EAs and EISs that are prepared by NOAA programs. However, the relevant materials necessary for clearance may vary slightly. Clearance for adopted EAs and EISs are described in more detail below.

NOAA review and clearance for adopted environmental assessments (EAs):

Clearance of adopted EAs is essentially the same as the clearance process for EAs prepared originally by NOAA programs¹². The NOAA program office must submit the following materials through their respective Assistant Administrators for clearance and signature:

1. A copy of the adopted EA;
2. A copy of the signed adoption document;
3. A copy of the FONSI prepared by the responsible NOAA program for signature by the appropriate Assistant Administrator;
4. A transmittal memo from the AA with a request for the NOAA NEPA Coordinator's concurrence on the FONSI; and
5. An original letter to "All Interested Government Agencies and Public Groups"¹³ for signature by the NEPA Coordinator.

NOAA review and clearance for adopted environmental impact statements (EISs):

Adopted EISs that are being filed at EPA as final EIS need to be cleared by the NEPA Coordinator prior to being filed. As for EISs originally drafted by NOAA programs, the NOAA NEPA Coordinator will sign the transmittal memorandum to the EPA Office of Federal Activities when such circulation is necessary.

In instances where the responsible NOAA program was a cooperating agency on an EIS that is proposed for adoption, the NEPA Coordinator should be requested for his/her concurrence before deeming the EIS sufficient.

If you have any questions about this guidance, please contact Ramona Schreiber or Steve Kokkinakis of my staff at (301) 713-1622.

Enclosures

¹² See NAO 216-6 § 5.03e for NOAA review and clearance procedures for EAs.

¹³ See NAO 216-6 § 5.07 and Exhibit 6 example in NAO 216-6.

**CHECKLIST FOR ADOPTING ENVIRONMENTAL IMPACT STATEMENTS
PREPARED BY OTHER FEDERAL AGENCIES***

NOAA program officials should consider the following in determining if an EIS prepared by another agency is sufficient for adoption. If the document is not sufficient for NOAA's purposes, it cannot be adopted.

I. Consider the similarities and differences between NOAA's proposed action and the proposed action of the Federal agency that prepared the EIS.

NOAA's proposed action must be described in the other agency's EIS, or the action(s) described in the other agency's EIS must be substantially the same as NOAA's action. Further, the effects of NOAA's action(s) must be covered in the EIS. If NOAA's proposed action(s) is (are) not described in the EIS or substantially the same as the action(s) described in the EIS, or the environmental effects of NOAA's action are not covered, the NOAA program will need to prepare a separate EIS.

II. Review the EIS itself and determine if it contains all required components.

If the EIS doesn't contain all of the following components (from NAO 216-6 § 5.04b), the NOAA program will need to prepare a supplemental EIS to make sure all required parts are complete.

- A cover sheet and table of contents;
- A discussion of the purpose and need for the action;
- A summary of the EIS, including the issues to be resolved, and in the FEIS, the major conclusions and areas of controversy including those raised by the public;
- A listing of alternatives, as required by Sections 102(2)(C)(iii) and 102(2)(E) of NEPA;
- A description of the affected environment;
- A succinct description of the environmental impacts of the proposed action and alternatives, including cumulative impacts;
- A listing of agencies and persons consulted, and to whom copies of the EIS are sent; and
- An index and appendices, as appropriate.

III. If NOAA was a cooperating agency, were all of its comments (if any) addressed?

If NOAA was a cooperating agency on the EIS and submitted comments to the lead agency regarding the document's preparation, all comments should be addressed in the final EIS being adopted. This does not necessarily mean that all of NOAA comments have to have been incorporated. Rather, the lead agency should have either incorporated NOAA's comments into the final EIS, or explained why they were not.

* Use this checklist in conjunction with NOAA Memorandum, *Guidance on Adopting NEPA Documents Prepared by Other Federal Agencies*.

**CHECKLIST FOR ADOPTING ENVIRONMENTAL ASSESSMENTS PREPARED BY
OTHER FEDERAL AGENCIES***

NOAA program officials should consider the following in determining if an EA prepared by another agency is sufficient for adoption. If the document is not sufficient for NOAA's purposes it cannot be adopted. .

I. Consider the similarities and differences between NOAA's proposed action and the proposed action of the Federal agency that prepared the EA.

NOAA's proposed action must be described in the other agency's EA, or the action(s) described in the other agency's EA must be substantially the same as NOAA's action. Further, the effects of NOAA's action(s) must be covered in the EA. If NOAA's proposed action(s) is (are) not described in the EA or substantially the same as the action(s) described in the EA, or the environmental effects of NOAA's action are not covered, the NOAA program will need to prepare a separate EA or EIS.

II. Review the EA itself and determine if it contains all required components.

If the EA does not contain all of the following components (from NAO 216-6 § 5.03b), it will need to be supplemented prior to it being adopted.

- Sufficient evidence and analysis for determining whether to prepare an EIS or a FONSI, and to facilitate preparation of any needed EIS;
- A brief discussion of the need for the action;
- Alternatives as required by section 102(2)(E) of NEPA;
- A brief discussion of the environmental impacts of the proposed action and alternatives; and
- A listing of agencies and persons consulted.

III. Consider the significance of the effects of NOAA's proposed action.

Does NOAA's proposed action meet the non-significance criteria of sections 6.01 and 6.02 of NAO 216-6? If a FONSI cannot be made with regard to NOAA's proposed action an EA cannot be adopted for the action. In such cases, the NOAA program must supplement the EA or prepare an EIS. The other agency's EA can, however, contain information and analyses that could be incorporated by reference.

* Use this checklist in conjunction with NOAA Memorandum, *Guidance on Adopting NEPA Documents Prepared by Other Federal Agencies*

Exhibit 3: Template for preparing adoption memos

[Date]

Memorandum To: The Record

From: [Assistant Administrator]

Subject: Adoption of [insert title of EA or EIS being adopted]

Background

[Describe NOAA's proposed action.]

[Describe the proposed action of the agency that prepared the EA or EIS being adopted. This should come directly from that document.]

[Compare the other agency's proposed action with NOAA's proposed action. Indicate how they are related to the degree that warrants adoption of the EA or EIS by NOAA.]

Alternatives and Impact Assessment

[Summarize the alternatives considered by the other agency. Include a brief discussion of each and include any references to alternatives that were considered but rejected.]

[Summarize the "Environmental Consequences" section of the EA or EIS being adopted. Briefly describe any of the major issues discussed and how they were resolved. Also include a summary of any scoping and public input that was received.]

NOAA Review

[Explain in this section that the NOAA program has independently reviewed the other agency's EA or EIS and briefly discuss the conclusions that NOAA reached as a result of this review as it pertains to the impacts/effects of NOAA's proposed action.]

Conclusion and Findings

[Indicate NOAA's major findings and describe NOAA's resulting course of action. If there are any conditions being placed on the adoption of the other agency's EA or EIS list them here.]